

EXHIBIT E

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1 which you were denied the opportunity.

2 In this particular case, the reason we don't
3 have the taxes is because of the act of fraud as we
4 allege of the defendant. It's a little tough --

5 CHIEF JUSTICE ROBERTS: I'm sorry, because
6 of -- because of what?

7 MR. KOERNER: The fraud of the defendant.
8 It's a little hard to argue when you've created the
9 situation so we can't collect that an inability to
10 collect then becomes no property. After Pasquantino
11 this Court decided the Anza case, which I'll discuss for
12 both issues.

13 JUSTICE BREYER: Before you get to Anza,
14 this might be a good time to ask because I don't think
15 we focused on this in Pasquantino. But if in fact the
16 failure of a State to collect a tax is property, then
17 why isn't every corporation that files an income tax
18 return and makes two false statements automatically
19 liable for RICO? I mean --

20 MR. KOERNER: As long as they meet the
21 definition of --

22 JUSTICE BREYER: Well, that would mean the
23 States have a new method, which I don't think they use,
24 a new method of collecting treble taxes from anyone who
25 makes two false statements or a false statement in two

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1 income tax returns, and it would seem to me that would
2 have vast repercussions. I mean, it might be very
3 beneficial; the States are having a deficit crisis;
4 but --

5 MR. KOERNER: If people --

6 JUSTICE BREYER: How, how -- why would it
7 not be --

8 MR. KOERNER: Why would --

9 JUSTICE BREYER: But they left -- they don't
10 have the RICO predicate, not paying your State taxes.
11 But in effect you would read into the RICO
12 predicate protecting States.

13 MR. KOERNER: This is precisely what
14 happened in Anza.

15 JUSTICE BREYER: That may be, but nobody
16 focused on this issue. So -- so that's what's bothering
17 me. What is the -- what is the stopping place?

18 MR. KOERNER: If you're --

19 JUSTICE BREYER: Or is there one? And if
20 there is none, how do we reconcile this view of --
21 they're suggesting a stopping place, Anza and
22 Pasquantino to the contrary. Right. But they're
23 suggesting a stopping place on a matter that hasn't come
24 up.

25 MR. KOERNER: But they're suggesting --

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1 JUSTICE BREYER: Or focused on. It's come
2 up but not focused on.

3 MR. KOERNER: But they're suggesting a
4 stopping place which is inconsistent with the actual
5 language of the RICO --

6 JUSTICE BREYER: So in your view
7 California --

8 MR. KOERNER: Well, may I --

9 JUSTICE BREYER: -- which has a \$10 billion
10 deficit, could go through, find every instance where a
11 corporation made two false statements in two tax
12 returns, one in each, and collect treble what they're
13 owed.

14 MR. KOERNER: If there is a systematic
15 understatement under the statute, that's exactly --

16 JUSTICE BREYER: It doesn't say systematic
17 understatement.

18 MR. KOERNER: It says --

19 JUSTICE BREYER: It says two --

20 MR. KOERNER: Correct.

21 JUSTICE BREYER: -- predicate acts.

22 MR. KOERNER: And in these --

23 JUSTICE BREYER: And the predicate acts are
24 a deliberate false statement.

25 MR. KOERNER: And indeed that -- that is

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1 what Congress intended. If you look --

2 JUSTICE BREYER: If they did, then why
3 didn't they put in not paying your State tax returns as
4 a predicate act?

5 MR. KOERNER: Well, in fact what they put in
6 in 1978 was the Contraband Cigarette Trafficking --

7 JUSTICE BREYER: Oh, well, that cuts against
8 you.

9 MR. KOERNER: No.

10 JUSTICE BREYER: Because if they put in one,
11 your theory -- they don't even need, whether they need
12 that or not. Your theory applies to every tax, every
13 tax.

14 MR. KOERNER: Well, the reason they put it
15 in was to increase the criminal penalties as well as
16 recognize the civil penalties.

17 JUSTICE BREYER: No, but go back to my
18 question.

19 MR. KOERNER: The importation -- yes.

20 JUSTICE BREYER: My question is, forget the
21 cigarette taxes. If I accept your argument, am I then
22 saying that California, New York, and every other State
23 that's owed money by corporations in their taxes can go
24 through, look for two tax returns that have a false
25 statement in them that were mailed in, and thereby

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1 collect RICO damages?

2 MR. KOERNER: Yes, that's correct.

3 JUSTICE BREYER: Well, that's a pretty
4 far-reaching --

5 MR. KOERNER: Well --

6 JUSTICE BREYER: Do you know anybody, any
7 court that has ever said that?

8 MR. KOERNER: Well, the issue hasn't been
9 raised. But the -- but the -- RICO has been
10 consistently interpreted by this Court in an
11 expansionist mode, and despite that Congress has not
12 truncated it except in the one area of securities
13 violation and only because they found that there were
14 ample remedies in securities law, and because they
15 thought it was inappropriate to use exclusively mail and
16 wire fraud.

17 JUSTICE BREYER: Why would --

18 JUSTICE SCALIA: Why should that help?

19 JUSTICE BREYER: If Congress wanted that
20 result, why didn't they put in as a predicate act not
21 paying your income tax or not paying your State tax?

22 MR. KOERNER: Because they had a more
23 general definition, and they wanted the broadest
24 possible interpretation. But the Cigarette Contraband
25 Trafficking Act was put into RICO as a predicate crime.